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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 411

JAMES M. GORDON,

Petitioner,

vs.

KENYON J. SCUDDER, Superintendent of the California Institute for Men, Located at Chino, California,

Respondent.

RESPONDENT'S OPPOSING BRIEF.

FRED N. HOWSER,
Attorney General of the State of California,
FRANK W. RICHARDS,
Deputy Attorney General,
600 State Building, Los Angeles 12,
Attorneys for Respondent.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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RESPONDENT'S OPPOSING BRIEF.

Petitioner seeks a review by this Honorable Court of a decree of the United States Circuit Court of Appeals for the Ninth Circuit affirming an order of the District Court of the United States for the Southern District of California, Central Division, discharging order to show cause and denying petition for writ of habeas corpus. [R. 93, 126.] Petitioner claims that the decision of said United States Circuit Court of Appeals conflicts with applicable decisions of this Honorable Court. (Page 8 of Petition.)

Statement of the Case.

Petitioner filed with the District Court of the United States for the Southern District of California, Central Division, a petition for a writ of habeas corpus, contending that he is being illegally imprisoned in a prison of the State of California at Chino, San Bernardino County, in violation of the Fourteenth Amendment of the Constitution of the United States in that he was denied the right of appeal, the state statute under which he was convicted is vague and uncertain, he was not informed of the basis of the offense charged against him nor given an opportunity to prepare his defense thereto, and denied a fair and impartial trial because evidence of purported crimes of which he was not accused was permitted to be introduced. [R. 2, 3.] He alleged that he appealed his conviction to the District Court of Appeal of the State of California, Second Appellate District, which affirmed the judgment of conviction (*People v. Gordon*, 71 Cal. App. (2d) 606, 163 P. (2d) 110), that his petition for rehearing by that court was denied and his petition for a hearing in the Supreme Court of California was denied, that he moved the said District Court of Appeal to recall its remittitur and this motion was denied, that his application to the Supreme Court of California to review said order of the District Court of Appeal was denied, that he applied to the Supreme Court of California for a writ of habeas corpus and the same was denied without opinion, that while imprisoned in the State Prison at San Quentin, Marin County, California, he applied to the United States District Court in and for the Northern District of California for a writ of habeas corpus upon the same grounds and that his application was denied, as well as his request

for the issuance of an order to show cause. [R. 5, 6, 7, 29, 30.]

Honorable Jacob Weinberger, Judge of the District Court of the United States for the Southern District of California, Central Division, issued an order to show cause why a writ of habeas corpus as prayed for should not issue. [R. 87.] After the matter had been fully presented by the filing of points and authorities and oral argument by the respective parties, the court stated its conclusions [R. 88], and ordered the discharge of the order to show cause and denied the petition for a writ of habeas corpus. [R. 93.]

Honorable Albert Lee Stephens, Judge of the United States Circuit Court of Appeals for the Ninth Circuit allowed an appeal to that court. [R. 110.] Following submission of the cause for consideration and decision [R. 119], the court rendered an opinion affirming the order of the lower court [R. 121-125] and in conformity therewith filed and entered its decree. [R. 126.]

The order of the lower court was affirmed upon the ground that petitioner had not exhausted his remedies in the state courts, including such remedies as he may have by appeal or application for a writ of certiorari to the Supreme Court of the United States. [R. 123.] In so holding, the court considered and construed the law as laid down by the Supreme Court of the United States in *Ex parte Hawk*, 321 U. S. 114, *White v. Ragen*, 324 U. S. 762, *Urquhart v. Brown*, 205 U. S. 179, *Williams v. Kaiser*, 323 U. S. 482, *De Saussure v. Gaillard*, 127 U. S.

216, 234, and *Johnson v. Risk,* 137 U. S. 300. The court concluded that, since California has no rule relative to hearings on petitions for habeas corpus such as exists in Illinois, the judgment of the Supreme Court of California denying the writ without opinion could not have been rendered without deciding the question of whether petitioner had been denied rights guaranteed by the Fourteenth Amendment, although the petition also presented non-federal questions.

In his petition filed with the Supreme Court of California, petitioner alleged (1) that he was denied his constitutional right of appeal in violation of the provisions of Article VI, Section 4, of the California Constitution, and was denied due process of law guaranteed to him by the provisions of Article I, Section 13, of the California Constitution and the Fourteenth Amendment to the United States Constitution in that the written decision of the District Court of Appeal of the State of California affirming the judgments of conviction incorrectly stated the evidence and omitted material facts appearing in the transcript of the evidence, attributed testimony to the complaining witnesses which in truth and in fact was not given by them, referred to and relied upon evidence which was excluded as to this defendant and received only as against his co-defendant in affirming the convictions as to four of the seven counts of grand theft and in affirming the conviction on the conspiracy count [R. 32, 33]; (2) that Section 182 of the Penal Code is unconstitutional and void in that it does not contain a definition of the

cause "to cheat and defraud by means which are in themselves criminal" nor does it establish the elements constituting such crime and is vague and uncertain; (3) that the judgment of conviction on the conspiracy count was and is void in that the verdict of the jury does not disclose whether defendant was found guilty of a conspiracy to cheat and defraud by means which are in themselves criminal, or a conspiracy to obtain money or property by false pretenses, or of a conspiracy to obtain money or property by false promises with fraudulent intent not to perform such promises, or of a conspiracy to commit grand theft [R. 42]; (4) that the trial court did not have jurisdiction to impose a judgment of imprisonment on the conspiracy count in that there was no proof of the existence of a conspiracy within three years of the return of the indictment [R. 46]; and (5) that defendant was denied his constitutional right to a fair and impartial trial guaranteed to him by Article 1, Section 13 of the California Constitution and the Fourteenth Amendment to the United States Constitution in that the trial court, over objections, permitted the introduction of evidence tending to show the commission by defendant of offenses of which he was not accused. [R. 48.]

Question Presented.

Does the decision rendered herein by the United States Circuit Court of Appeals for the Ninth Circuit conflict with applicable decisions of the Supreme Court of the United States?

Argument.

The decision of the United States Circuit Court of Appeals for the Ninth Circuit is not in conflict with applicable decisions of the Supreme Court of the United States. The decision states:

> ". . . From the face of the petition (filed with Supreme Court of California) it affirmatively appears that a federal question was presented, viz.: that appellant had been deprived of certain rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. The petition also charged that appellant had been deprived of certain rights guaranteed him by the state constitution of California. Thus on the face of the petition federal and non-federal questions appear and a decision as to each was necessary to the determination of the cause. A decsion that in appellant's trial no right under the state constitution had been denied him would still leave demanding attention and decision the question of whether appellant had been denied rights guaranteed by the Fourteenth Amendment and the judgment denying the writ could not have been rendered without deciding it." [R. 125.]

It is apparent from a mere cursory examination of the petition filed with the Supreme Court of California for a writ of habeas corpus that the judgment denying the writ could not have been rendered without deciding the federal questions. For instance, the petition alleges:

> "That defendant was denied his constitutional right of appeal in violation of the provisions of Article VI, Section 4, of the California Constitution, and was denied due process of law guaranteed to him by the provisions of Article I, Section 13, of

the California Constitution and the Fourteenth Amendment to the United States Constitution in that the written decision of the District Court of Appeal affirming the judgments of conviction (1) incorrectly stated the evidence and omitted material facts appearing in the transcript of the evidence; (2) attributed testimony to the complaining witnesses which in truth and in fact was not given by them; (3) referred to and relied upon evidence which was excluded as to this defendant and received only as against his co-defendant in affirming the convictions as to four of the seven counts of grand theft and in affirming the conviction on the conspiracy count." [R. 32, 33.] "That defendant was denied his constitutional right to a fair and impartial trial guaranteed to him by Article I, Section 13 of the California Constitution and the Fourteenth Amendment to the United States Constitution in that the trial court, over objections, permitted the introduction of evidence tending to show the commission by defendant of offenses of which he was not accused." [R. 48.]

So far as we have observed, the above are the only federal questions presented by the petition filed with the Supreme Court of California for a writ of habeas corpus. By the manner in which the federal and non-federal questions were pleaded the judgment could not have been rendered without deciding all of these questions. It is practically impossible to segregate the federal from the non-federal questions. The fact that the petition was denied by the Supreme Court of California without opinion, or any indication of the basis of the denial, did not in and of itself deprive the Supreme Court of the United States of jurisdiction to grant certiorari. The

cases of *White v. Ragen,* 324 U. S. 760; *House v. Mayo,* 324 U. S. 42; *Woods v. Nierstheimer,* 328 U. S. 211, and *Lynch v. New York,* 293 U. S. 52, 54, cited by petitioner on page 9 of his petition, do not so hold.

The opinion rendered herein by the United States Circuit Court of Appeals for the Ninth Circuit correctly construes the decision of the Supreme Court of the United States in *White v. Ragen, supra,* (324 U. S. 760). The opinion states "that where the Supreme Court of the United States is asked to review a petition for habeas corpus denied by the Supreme Court of Illinois without opinion and said petition presents on its face questions of fact, it, the Supreme Court of the United States, cannot say that the denial of the writ by the Supreme Court of Illinois did not rest upon an adequate non-federal ground," because of a rule adopted by the Supreme Court of Illinois to the effect that said court will not consider petitions for habeas corpus wherein questions of fact are relied on. [R. 124.] The Supreme Court of California, as the opinion of the United States Circuit Court of Appeal for the Ninth Circuit points out [R. 125], has no such rule.

The remedy of habeas corpus is available in the State of California for the protection and enforcement of constitutional rights even where questions of fact are raised by the petition. In such cases a referee is appointed by the Supreme Court of California to take evidence and submit findings.

In re Ward, 28 Cal. (2d) 583, 170 P. (2d) 665;

In re Marvich, 27 Cal. (2d) 503, 165 P. (2d) 241;

In re Mooney, 10 Cal. (2d) 1, 15, 73 P. (2d) 554, 561.

In *House v. Mayo,* 324 U. S. 42, cited by petitioner, the District Court of the United States did not reach the question whether petitioner had exhausted his state remedies, a prerequisite to relief by habeas corpus in the federal courts, but rested its decision wholly on different grounds. One of the grounds reached by the District Court in the case at bar was, "The petitioner has not exhausted all state remedies available to him which include appellate remedies to the Supreme Court of the United States by appeal or certiorari." [R. 92.] Another distinguishing feature is that it appeared from the record in *House v. Mayo* that the remedy sought in the Supreme Court of Florida was not the appropriate one under Florida law.

In *Woods v. Nierstheimer,* 328 U. S. 211, cited by petitioner, the court said:

> "Since the record thus shows that petitioner's applications for a writ of habeas corpus were probably denied because he did not seek the proper remedy under Illinois law, it does not appear that the judgments we are asked to review do not rest on an adequate non-federal ground."

In *Lynch v. New York,* 293 U. S. 52, cited by petitioner, it is stated:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

No contention is made by petitioner herein that a decision on the federal questions was not necessary to the determination of the cause by the Supreme Court of California. But petitioner states that, "It is submitted that the basic fallacy underlying the conclusion by the court below that petitioner did not exhaust his state remedies, is its assumption that because federal questions were presented to the state court such court necessarily decided such questions and predicted its judgment thereon." (Page 9, petition.) From the manner in which the federal and non-federal questions were presented by the petition for a writ of habeas corpus filed with the Supreme Court of California, as hereinabove pointed out, it is not fair to state that the United States Circuit Court of Appeals for the Ninth Circuit assumed from the mere fact that federal questions were presented they were necessarily decided. Such an assumption dehors the record.

In concluding this point, we respectfully submit that the decision of the court below in nowise conflicts with applicable decisions of this Honorable Court.

The other matters set forth in appellant's petition for a writ of certiorari, namely, that California, in violation of the Fourteenth Amendment, denied petitioner his right of appeal and otherwise violated said amendment (Petition, pp. 10, 13), are foreign to the question of whether or not the decision of the United States Circuit Court of Appeals for the Ninth Circuit conflicts with applicable decisions of the Supreme Court of the United States.

We have hereinabove pointed out that the only federal questions presented to the Supreme Court of California were (1) that petitioner was denied his constitutional right of appeal in violation of the due process of law

clause of the Fourteenth Amendment because the District Court of Appeal of California, in affirming the judgments of conviction (*People v. Gordon*, 71 Cal. App. (2d) 606, 163 P. (2d) 110), incorrectly stated the evidence, etc., and (2) that petitioner was denied his constitutional right to a fair and impartial trial in violation of the Fourteenth Amendment because evidence tending to show the commission by defendant of offenses of which he was not accused were introduced into evidence over his objections.

These matters were not mentioned by the United States Circuit Court of Appeals for the Ninth Circuit in its decision. The only possible relevancy they could have to the granting of the petition herein is that said matters present a rare and exceptional case of peculiar urgency justifying the interference by a federal court of the due and orderly administration of justice by the state courts of California.

A state cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.

> *Ex parte Converse*, 137 U. S. 624, 11 S. Ct. 191, 193.

The Constitution of the United States does not guarantee that the decisions of the state courts shall be free from error.

> *Worcester County Trust Co. v. Riley*, 302 U. S. 292, 58 S. Ct. 185, 188.

Federal courts do not sit to review the finding of facts made in the state court, but accept the findings of court of the state upon matters of fact as conclusive and confine their review to questions of federal law within the jurisdiction conferred upon them.

> *Waters-Pierce Oil Co. v. Texas,* 212 U. S. 86, 29 S. Ct. 220, 221.

In *Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies,* 312 U. S. 287, 61 S. Ct. 552, 555, it is said:

> ". . . The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. . . ."

In *Lisenba v. People of State of California,* 314 U. S. 219, 62 S. Ct. 280, 286, it is said:

> "Testimony was admitted concerning the death of James' former wife, on the widely recognized principle that similar but disconnected acts may be shown to establish intent, design, and system. The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the state's law."

Under the principles of law thus announced by this Honorable Court, it is clear that said matters do not present a rare and exceptional case of peculiar urgency justifying the interference by a federal court of the due and orderly administration of justice by the state courts of California.

Conclusion.

We respectfully urge that the petition filed herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit be denied.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the State of California,

FRANK W. RICHARDS,
Deputy Attorney General,

Attorneys for Respondent.